IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

IN RE HICKS/BROWN MINORS

Supreme Court No.: 153786

Court Of Appeals No.: 328870

Circuit Court No.: 12-506605-NA

AMICUS CURIAE BRIEF OF THE NATIONAL DISABILITY RIGHTS NETWORK, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, THE ARC MICHIGAN AND THE ARC OF THE UNITED STATES

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On July 26, 2016, this Court ordered oral argument on whether to grant the Lawyer-Guardian Ad Litem's ("LGAL") Application for Leave to Appeal the Court of Appeals' April 26, 2016 judgment in this case and ordered the parties to submit supplemental briefing on three issues. For the reasons stated in their accompanying motion, the National Disability Rights Network ("NDRN"), American Civil Liberties Union of Michigan ("ACLU"), The Arc Michigan and The Arc of the United States (collectively with the NDRN, ACLU, the Arc Michigan, and The Arc of the United States, "Amici") respectfully request that this Court accept this Amicus brief pursuant to MCR 7.312.

STATEMENT OF QUESTION PRESENTED

Should this Court deny leave to appeal in this parental rights cases involving a mother with intellectual disability where the Court of Appeals correctly found that the Department failed in its statutory duty to make reasonable efforts to reunify the family unit because the case service plan never included reasonable accommodations to provide the respondent with a meaningful opportunity to benefit?

The Appellant Department answered:: No.

The Appellee-Mother answered: Yes.

The Minor Children answered: No.

The Amici answer: Yes.

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus, the National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act. Because of its national P&A membership and familiarity with the protections afforded by each State to persons with disabilities, NDRN has firsthand knowledge of state laws and how they operate in practice. NDRN is thus well placed to assist the Court in surveying the impact upon persons with disabilities of state laws regarding the termination of parental rights.

The American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of a nationwide nonpartisan organization of over 500,000 members dedicated to protecting the rights guaranteed by the Constitution and our nation's civil rights laws. The ACLU has long been committed to protecting the due process rights of parents, the rights of persons with disabilities, and the rights of children. The ACLU regularly files amicus curiae briefs on constitutional and civil rights questions pending before this and other courts.

The Arc Michigan is a Michigan organization that has worked for more than 60 years to ensure that people with developmental disabilities are valued in order that they and their families can participant fully in and contribute to their community. Over 30 local chapters and thousands of members across Michigan work to ensure persons with disabilities are afforded their full rights as citizens, are accommodated and supported to fully participate in their communities and are provided the supports and services they need to lead desirable lives.

The Arc of the United States, founded in 1950, is the nation's largest community-based organization of and for people with intellectual and/or developmental disabilities. The Arc promotes and protects the human and civil rights of people with such disabilities and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with intellectual and/or developmental disabilities receive the protections and supports provided by law. The Arc has long taken the position that people with intellectual and/or developmental disabilities have the right to make decisions about having and raising children and to have access to the proper supports on an individual basis to assist them in raising their children within their own home. With over 600 state and local chapters nationwide, the Arc is well positioned to comment on the impact of state family law statutes upon people with intellectual and developmental disabilities and their children.

INTRODUCTION

The Court of Appeals in this case reached the correct conclusion: when a state agency fails to provide reasonable accommodations to a parent with disabilities in a case service plan, the agency fails in its statutory duty to make reasonable efforts to reunify the family. When this happens, the state simply cannot satisfy the high burden (i.e., clear and convincing evidence) required to take the drastic measure of terminating parental rights. Failing to provide a parent with disabilities with an appropriate case service plan necessarily leaves a "hole" in the evidence that prohibits a court from finding that the requisite grounds for termination have been satisfied. How can a trier of fact find evidence so clear and weighty to come to a clear conviction, without hesitancy, that a person with disabilities cannot remedy the grounds leading to adjudication or otherwise provide proper care for his or her child when the parent was never given the appropriate reasonable accommodations? The answer is, as the Court of Appeals held, that they cannot. The American with Disabilities Act ("ADA"), the Rehabilitation Act of 1973 and the Michigan Probate Code, as well as common sense, dictate such a ruling. The Court of Appeals correctly vacated the termination order in this case and remanded the case to the circuit court for reconsideration after the provision of necessary accommodating services, after finding that reasonable efforts were not yet made in this case.

"[P]arental termination decrees are among the most severe forms of state action . . .[.]" *MLB v SLJ*, 519 US 102, 127-28; 117 S Ct 555; 136 L Ed 2d 473 (1996). Proceedings to terminate a parent's relationship with their child involve rights "of basic importance in our society" that demand "the close consideration the Court has long required when a family association so undeniably important is at stake." *Id.* at 116-17.

Despite the United States Supreme Court's statements on the importance of the parental relationship (and the correspondingly high burden the state must meet to sever such ties), people

with disabilities in this country have faced a shameful history of having their fundamental rights, including their parental rights, denied. For instance, persons with intellectual disability were often sterilized to prevent their procreation.[1] [2] In *Buck v Bell*, 274 US 200, 207 (1927), the Supreme Court upheld the practice of forced sterilization, stating, "[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . Three generations of imbeciles are enough." Even though *Buck v Bell* has been severely criticized, it has not been overruled. And as recently as 1999, over 30 states had laws restricting or prohibiting marriage for people with psychiatric disabilities. Craig Hemmens et al, *The Consequences of Official Labels: An Examination of the Rights Lost by the Mentally Ill and Mentally Incompetent Ten Years Later*, 38 Community Mental Health Journal 2, 136 (2002).

Despite making some progress and acknowledgment of the rights of people with disabilities, the insidious stereotypes behind those past practices persist today. The perception that people with intellectual and/or developmental disabilities cannot be appropriate parents pervades the termination of parental rights process all too often. This new latent discrimination includes several layers:

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[1] Amici use the term "intellectual disability" in place of "mental retardation" except when directly quoting others. Although the latter term appears in some relevant case law and other documents cited here, it is offensive to many persons and has been replaced by more sensitive and appropriate terminology. As the United States Supreme Court stated in *Hall v Florida*, 134 S Ct 1986, 1990; 188 L Ed 2d 1007 (2014): "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon. See Rosa's Law, 124 Stat. 2643 (changing entries in the U.S. Code from "mental retardation" to "intellectual disability"); Schalock et. al, *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 Intellectual & Developmental Disabilities 116 (2007)."

[2] "Intellectual disability" has three elements: (1) significantly impaired intellectual functioning; (2) adaptive behavior deficits in conceptual, social, and practical adaptive skills; and (3) origination of the disability before age 18. See American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010), p 1.

> First, some [termination of parental rights] statutes have been interpreted so that developmental disability alone leads to a presumption of unfitness, justifying both state intervention and judicial action against parents labeled as developmentally disabled.
>
> Second, many statutes that seem to explicitly require a connection between developmental disability and parenting ability in order to terminate parental rights have been interpreted in ways that overlook the parenting abilities of individual parents; beliefs about the parenting abilities of the group labeled developmentally disabled are assumed to hold true for all parents with developmental disabilities.
>
> Third, parents labeled developmentally disabled are often not offered reunification services because they are presumed incapable of learning how to parent.
>
> Finally, when reunification services are offered, they often do not take into account the parent's disability, so that the primary condition that led to state intervention is not addressed. [Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 Cal L Rev 1415, 1438 (1995).]

In reviewing reported termination cases involving parents with actual or presumed intellectual disability, Professor Robert Hayman said, as to many of the cases:

> First, they display a remarkable degree of deference to expert testimony about the nature and impacts of the alleged disability. Second, the fact of mental retardation, once established, often has the effect of shifting the various burdens of proof from the state to the parent. . . . Finally, courts demonstrate an extraordinary resourcefulness for legitimating termination decisions with formal findings regardless of the meaningfulness of the process. [Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv L Rev 1202, 1237 (1990).]

A 2012 report issued by the National Council on Disability (the "NCD"), an independent federal agency, found that the "legal system is not protecting the rights of parents with disabilities and their children." *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, National Council on Disability (September 27, 2012), p 16 (the "NCD Report"), available at http://www.ncd.gov/publications/2012/Sep272012. The NCD

Report performed groundbreaking and thorough research on the experience of parents with disabilities in order to provide a comprehensive overview of the knowledge, attitudes, and practices towards parents with disabilities and their children throughout the country. The report reviewed the social science research available on parenting with disabilities but found that such research is scarce which has allowed negative and unfounded stereotypes about the inability of people with disabilities to parent to perpetuate. Further, the sparse literature that can be found on this topic often takes it as a given that the parent's disability has a negative impact on the child. *Id*. at 185 (internal citations omitted). Indeed:

> Much of the research on parents with disabilities has been driven by a search for problems in these families. The pathologizing assumptions framing such research presuppose negative effects of the parents' disabilities on their children…Correlation and causation are often confused in the research, resulting in an impression that children's problems are caused by parents' disabilities. Contextual problems—such as poverty, the parents' history of abuse, substance use, and a lack of adequate supports—are frequently ignored, so any problems found by researchers end up being attributed to disability. [*Id*. at 185-86 (internal citations omitted).]

With regards to parents with intellectual and/or developmental disabilities, the report notes that much of the literature fails to distinguish between characteristics that facilitate parenting abilities and those that inhibit parenting abilities. Parents with intellectual and/or developmental disabilities, however, may benefit from training and supports and it is fully possible for their children to have successful outcomes. The report also highlights research that suggests it is impossible to predict parenting outcomes on the basis of intelligence testing. Most importantly, the report notes that:

> Even researchers and commentators who have reached the most negative conclusions about cognitively disabled parents caution that such parents must be evaluated as individuals before reaching conclusions about their parental adequacy, or their ability to

> benefit from training and support…While few conclusions can be drawn about the parenting abilities of developmentally disabled parents as a group, it is clear that individual inquiry is required before decisions are made to remove children from parents. [*Id*. at 188 (internal citations omitted).]

The report also delves into the eugenics movement of the early 20th Century as a backdrop for more than 30 states passing legislation permitting involuntary sterilization, noting that "This legislative trend was premised on the belief that people with disabilities and other 'socially inadequate' populations would produce offspring who would be burdensome to society…as a result of these state statutes, by 1970 more than 65,000 Americans had been involuntarily sterilized." *Id*. at 15. The report notes that "the power of the eugenics ideology persists" given that, in addition to the fact that even today several states have some form of involuntary sterilization laws, "[w]omen with disabilities still contend with coercive tactics designed to encourage sterilization or abortion because they are not deemed fit for motherhood." *Id*. Further:

> These parents are the only distinct community of Americans who must struggle to retain custody of their children. Removal rates where parents have a psychiatric disability have been found to be as high as 70 percent to 80 percent; where the parent has an intellectual disability, 40 percent to 80 percent…Parents with disabilities are more likely to lose custody of their children after divorce, have more difficulty in accessing reproductive health care, and face significant barriers to adopting children…Fully two-thirds of dependency statutes allow the court to reach the determination that a parent is unfit (a determination necessary to terminate parental rights) on the basis of the parent's disability…Discrimination against parents with disabilities is all too common throughout history, and it remains an obstacle to full equality for people with disabilities in the present. [*Id*. (internal citations omitted).]

In its position statement on "Parents with Intellectual and/or Developmental Disabilities," The Arc of the United States—a national advocacy organization for people with intellectual and developmental disabilities and an *amicus* party to this brief—notes:

> The history of discrimination toward individuals with intellectual and/or developmental disabilities includes the denial of rights and opportunities to have and to raise their own children. This history has included segregation and involuntary sterilization of adolescents and adults. After birth, infants have been removed immediately from parental care, and through legal provisions, parents have been denied the opportunity to raise their children in their home. Examples of social and social service biases and discriminatory practices include:
>
> - Presumption of incompetence, that is, a general belief that people with intellectual and/or developmental disabilities are unfit to be parents;
> - Limited supports to parents with intellectual and/or developmental disabilities;
> - Professional emphasis on limitations of parents with intellectual and/or developmental disabilities to the point of weakening parents' sense of competence and potential for success;
> - Public resources primarily focused on crisis-driven support;
> - Lack of trust of service providers or government officials by parents with intellectual and/or developmental disabilities based upon fears of losing their children and their vulnerability to arbitrary authority; and
> - Disproportionate representation of parents with intellectual and/or developmental disabilities in child custody proceedings, where, their competence as parents is held to higher, less flexible and more frequently applied standards than those applied to other parents.
>
> Despite research which documents the ability of many parents with intellectual and/or developmental disabilities to raise a child successfully with appropriate and effective supports, access to these supports continues to be limited, fragmented and uncertain. [3]

In short, parents with disabilities are handcuffed from the outset. Harmful stereotyping coupled with a failure to properly provide appropriate and reasonable accommodations (as

[3] Available at: http://www.thearc.org/who-we-are/position-statements/life-in-the-community/parents-with-idd

required by law) often result in the wrongful termination of the precious parent-child relationship.[4] And while termination in some cases may be warranted, the law requires the State to make reasonable efforts to reunify families—which means reasonable accommodations for persons with disabilities—before coming to this conclusion. In cases such as this, when reasonable efforts were not made, the courts must step in and prevent termination. The Court of Appeals made the correct decision; found that reasonable accommodations were not made in this case; and remanded the case back to the lower court for findings after such accommodations were made. This Court should deny leave.

STATEMENT OF MATERIAL FACTS AND PROCEDURAL HISTORY

Amici will not restate the facts and procedural history which, upon information and belief, are accurately set forth in the Appellee-Mother's Brief on Appeal and Supplemental Brief.

ARGUMENT

I. AS SOON AS THE STATE IS AWARE OF A PARENT'S DISABILITY, REGARDLESS OF HOW IT BECOMES AWARE, ITS LEGAL OBLIGATION TO CREATE A SERVICE PLAN TO ACCOMMODATE THE DISABILITY IS TRIGGERED.

When the Department removes children from their parents, it has a statutory obligation to make reasonable efforts to reunify the family. MCL 712A.19a. In order to realize this obligation, within thirty days of removal, the Department must assess a family's needs, design a case service plan to address those specific needs, and then implement the plan. MCL 712A.13a(10); MCL 712A.18f(1)(2); Mich Admin Code, R 400.12419(d)(e). After creating the

[4] The importance of keeping families together in most situations is undeniable. Children thrive most with their natural families and breaking familial integrity can have a negative effect on a child's developmental progress. See Jeniece Scott, Jennifer Mathis, & Ira Burnim, *Supporting Parents with Psychiatric Disabilities: A Model Reunification Statute*, UPenn Collaborative on Community Integration at 2, available at http://www.bazelon.org/LinkClick.aspx?fileticket=Kxu0I14DT-A%3D&tabid=640. State intrusion into these matters must be accomplished with the greatest level of care.

initial service plan, the Department must review it every 90 days and modify the plan as necessary to ensure that it continues to address the family's needs. MCL 712A.18f(5); Mich Admin Code, R 400.12418(2)(b); Mich Admin Code, R 400.12420(1)(e).

Where the Department has knowledge of a parent's disability, the Americans with Disabilities Act ("ADA"), 42 USC 12101 *et seq.*, requires the Department to design a case service plan that reasonably accommodates the parent's disability in order to ensure that parents receive individualized treatment as well as a full and equal opportunity to participate in services, which might require the provision of alternative or additional services. 42 USC 12132; 28 CFR 35.130(b). Failure to do so precludes a court from finding that "reasonable efforts were made to reunite the family." *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000).

Title II of the ADA prohibits state and local governments from discriminating against individuals with disabilities in their programs, services, and activities.[5] 42 USC 12132. To accomplish this goal, a public agency must make reasonable accommodations in its programs, services, and activities to ensure equally effective participation. 28 CFR 35.130(b)(1)(ii). The Michigan Court of Appeals has recognized that the reunification services and programs provided by the Department must comply with the ADA. *In re Terry*, 240 Mich App at 25. Indeed, the Court of Appeals recognized that the statutory obligation to make reasonable efforts to reunite a family is consistent with the ADA's directive that disabilities be reasonably accommodated. "In other words, if [the Department] fails to take into account the parents' limitations or disabilities

[5] Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 USC 794, similarly protects parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services. There are two common principles that are fundamental to both Title II of the ADA and Section 504: (1) individualized treatment and (2) full and equal opportunity. Both principles are of vital importance in relation to child welfare and parent termination proceedings where the Department and the courts are examining the unique and precious relationship between a parent and child.

and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite a family." *Id.* at 26.

The Department's obligation to make such reasonable accommodations for a parent's disability begins when the Department becomes aware of the disability or limitation, regardless of whether and when it receives some formal notice (e.g., an attorney, or the parent – even if able – notifies the Department). See *Robertson v Las Animas Co Sheriff's Dep't*, 500 F3d 1185 (CA 10, 2007) (stating that Title II mandates apply whenever the "disability is obvious or because the individual (or someone else) has informed the entity of the disability"); *Pierce v District of Columbia*, 128 F Supp 3d 250, 269 (DDC, 2015) (noting that nothing in Title II or Section 504 permits passive approach to protections under those statutes but actually requires affirmative action to give meaningful access to the services required). In cases like the one presented here, where it appears that just about every person involved in the case was aware of Ms. Brown's intellectual disability, it not only makes little common sense for the Department to ignore the disability but also undermines the entire goal of the ADA. If a formal finding or declaration of a parent's disability is required, then the Department can ignore a parent's obvious disability and disregard its legal responsibility to address the particular family needs of that parent. In short, the Department would be able to ignore a patently obvious disability and not make reasonable accommodations for that disability simply because there was no "formal" notice. To accept such a ludicrous proposition would undercut the purpose behind the ADA and would ultimately fail the parent with the disability and the entire family unit.

Where the Department has failed to make "reasonable efforts" to reunify a family, this Court has held that a court cannot terminate that parent's rights because there is a "hole in the evidence." See *In re Rood*, 483 Mich 73, 127; 763 NW2d 587 (2009) (Young, J., concurring); *In*

re Mason, 486 Mich 142, 160; 782 NW2d 747 (2010). Failing to account for an obvious disability regardless of whether "formal" notice of such a disability has been given creates exactly that "hole in the evidence" and fails to provide the legal accommodations required under the ADA and Michigan law. As suggested below, identifying a disability that qualifies for protections under the ADA is not a cookie cutter analysis, but instead is fact specific. And, as further explained below, the definition of disability should be broadly construed. Requiring some formal declaration before the Department takes action to reasonably accommodate an obvious disability would only act as a disservice to the family with the parent with a disability and undermine the goal of the ADA.

The Court of Appeals here reached the correct result, addressing what the "[Department] must do when faced with a parent with a *known or suspected* intellectual, cognitive, or developmental impairment[]" (emphasis in original) and that neither the Department nor the courts "may sit back and wait for the parent to assert his or her right to reasonable accommodations." (Court of Appeals Decision, p 16). Permitting a "sit back and wait" approach, particularly in cases where there is a clear disability, will only further the negative and harmful stereotypes and disparate treatment parents with disabilities have been facing in this country for decades, contrary to the legislative intent of our state and our nation.

II. "DISABILITY" IS TO BE INTERPRETED BROADLY AND SHOULD NOT REQUIRE EXTENSIVE ANALYSIS.

LGAL suggests in its supplemental brief that the Appellee-Mother failed to establish that she suffered from a disability under the ADA and that there has never been an express claim of such a disability, which made it "impossible for the trial court to effectively address the issue." (LGAL Supplemental Brief, p 25). This statement in itself evidences the problem with the Department's inactions in cases such as this one. To begin, by all accounts, it was demonstrably

clear that Ms. Brown had intellectual disability.[6] Both the Department and Appellee-Mother's briefs are replete with examples. (Appellee-Mother Supplemental Brief, pp 29-32; Department Supplemental Brief, pp 3-5). Indeed, Ms. Brown was found to have a Full Scale IQ of 70, which placed her in the second percentile and within the mild range of intellectual disability. (Appellee-Mother Supplemental Brief, p 5). As Appellee-Mother points out in her supplemental brief, the Department here had knowledge at the outset of the case that Ms. Brown had intellectual disability. (*Id.*, p 2). But even had the parent's disability not been so apparent, establishing that a parent deserves protection under the ADA was not intended to require extensive analysis.

In fact, on July 15, 2016, the United States Attorney General signed a final rule incorporating the requirements of the ADA Amendments Act of 2008 into the ADA Title II and Title III regulations, which take effect on October 11, 2016. Consistent with the ADA Amendments Act, the regulations establish that the definition of "disability" be interpreted broadly. Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008 Final Rule, 81 CFR 53203, 53204 (2016) ("The ADA Amendments Act made important changes to the meaning and interpretation of the term "disability" in the ADA in order to effectuate Congress's intent to restore the broad scope of the ADA by making it easier for an individual to establish that he or she has a disability."). Similarly, according to the State Court Administrative Office's September 9, 2016 memorandum addressing the regulations, "The question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." (Exhibit A). In cases like this, LGAL's

[6] See discussion in Section IV as well for further discussion about this issue.

suggestion that the Appellee-Mother did not sufficiently establish her disability highlights the failings of the system and cuts counter to the purpose and intent of the ADA.

III. HAVING A DISABILITY DOES NOT AND CANNOT CREATE A PRESUMPTION OF PARENTAL UNFITNESS.

Under Michigan law, the labeling of a parent as disabled is not sufficient evidence for a court to terminate parental rights. There must be clear and convincing evidence that supports at least one ground provided in MCL 712A.19b(3), none of which may be based merely on the fact that a parent has a disability. In other words, there is no presumption of parental unfitness because of a parent's disability, and the Department and the State cannot and should not conduct a termination proceeding as if there were such a presumption. The problem becomes, however, when the Department fails in its obligation to provide the reasonable accommodations for a parent with a known or suspected disability. That parent is often inherently at a disadvantage, whether it is described as a presumption of unfitness, or is based on implicit bias.[7]

Failing to make reasonable accommodations, to give individualized treatment, fails to give the parent with a disability equal opportunity to show their fitness as a parent so as to address the concerns of the Department or the court system, and more fundamentally, to learn the skills necessary to care, and provide an appropriate environment, for their child. The purpose behind the ADA is precisely to help people with disabilities attain equal treatment in such circumstances and to grant them reasonable accommodations for their disability to help them achieve success.

[7] In fact, many commentators and researchers have observed that such implicit presumptions still exist regardless of the parent's actual abilities. See Scott, *supra* note 4, at 3 n 11.

As described above, the implicit bias and discrimination that exists even today against parents with intellectual, developmental, and psychiatric disabilities is staggering.[8] Amici are not suggesting that state agencies or courts have to go to the ends of the Earth to accommodate a parent with disabilities—the ADA only requires "reasonable" accommodations—but one cannot ignore the fact that harmful stereotypes of people with disabilities persist today, including the stereotype that that those with such disabilities simply cannot learn to be capable and competent parents. The end result of the bias is that parents with disabilities are at risk of unjustly losing their rights more so than any other distinct community.

The President's Committee for People with Intellectual Disabilities (formerly, The President's Committee on Mental Retardation) has found that "[p]eople with mild cognitive limitation can be caring, concerned and competent parents if the appropriate supports and services are in place." President's Comm. on Mental Retardation, U.S. Dep't of Health & Human Servs., *The Forgotten Generation: 1999 Report to the President* at 82 (1999). The Committee recommended that states take action to assist people with mild cognitive limitations in preserving their parental rights. Among those recommendations were:

> i. Help people with mild cognitive limitations to identify and network with natural supports that may exist, such as extended families, neighbors, church members and others who might provide information, advice or assistance on parenting issues.

[8] In addition to the statistics mentioned above, the National Council on Disability found that parents with disabilities are "the only distinct community of Americans who must struggle to retain custody of their children." The NCD Report, *supra*, at 14. The Council also cited to a study that found that parents with a disability label in their school records were three times more likely to have their parental rights terminated than parents without such a label. *Id.* at 92. Other studies have found that parents with psychiatric disabilities are more likely to be involved in the child welfare system even though there is no evidence of higher rates of abuse or neglect. Scott, *supra* note 4, at 3.

> ii. Encourage agencies to involve resources experienced in working with individuals with mild cognitive limitations in providing assistance with child care and child protective services.
>
> iii. Educate child welfare agencies, family courts and others that individuals with cognitive limitations can be competent and effective parents, and how best to support these individuals. [*Id.* at 82.]

A disability does not mean that a person cannot be a parent with the proper support in place. Indeed, as the saying goes, "It takes a village to raise a child"—which is true whether or not a parent has a disability. Some studies have even shown that disability alone is not a predictor of problems or difficulties in children and that predictors of problem parenting are often found to be similar for parents with disability and parents without such disabilities. The NCD Report, citing Megan Kirshbaum and Rhoda Olkin, 20 *Parents with Physical, Systemic, or Visual Disabilities, Sexuality and Disabilities* 66, 67 (2002). It is of vital importance that parents with disabilities are provided with reasonable accommodations—not only because the law demands it, but also because it is necessary to combat the implicit bias and discrimination that such persons face in parental termination proceedings.

IV. FAILURE TO OFFER REASONABLE ACCOMMODATIONS TO A PARENT WITH A DISABILITY IN AN APPROPRIATE SERVICE PLAN PREVENTS A FINDING OF CLEAR AND CONVINCING EVIDENCE REQUIRED TO TERMINATE PARENTAL RIGHTS.

Failing to adopt an appropriate service plan and accommodate a parent's disability in a service plan necessarily means that there cannot be clear and convincing evidence to terminate a parent's rights. To borrow Justice Young's characterization in *In re Rood*, to do so necessarily leaves a "hole" in the evidence. One can never "produce[] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue[,]" *Hunter v Hunter*, 484 Mich 247,

265-66; 771 NW2d 694 (2009), when the very basis of the decision is based on incomplete information.

As stated above, once the State becomes aware of a parent's disability, its obligation to adopt an appropriate service plan that provides reasonable accommodations for that parent is triggered. Without the utilization of the appropriate, individually tailored service plan, there simply cannot be clear and convincing evidence to terminate parental rights. (Again, there is a "hole" in the evidence). Termination without reasonable accommodations having been made is reversible error, and in such circumstances the State must be instructed to remand for the provision of the legally required reasonable accommodation services before a legally proper termination decision can be made, as the Court of Appeals ordered here.

Termination of parental rights is such a severe measure, it cannot—and should not—be done lightly, and certainly not when necessary evidence is missing. As everyone in this case acknowledges, before a trial court can terminate the rights of a parent, State law demands the Department must make reasonable efforts to reunify a parent with her children. MCL 712A.19a(2). In other words, the State places a premium on keeping the family unit together when at all possible. Given the well-documented history of discrimination against parents with intellectual and other disabilities in this country, it is essential that the ADA requirements with regards to child welfare agencies and parental termination proceedings are meaningfully enforced. Parents with disabilities deserve the opportunity to keep their families together as well. And Michigan law and the ADA require the Department to take the parent's disability into account and make reasonable accommodations to help achieve reunification when possible. There will undoubtedly be circumstances when termination is the appropriate course, but failing to make reasonable accommodations in the Department's efforts to reunify the family leaves

critical evidence—indeed, a critical step—out of the process and fails to provide the courts with necessary information to take the drastic measure to terminate a parent's rights. The Court of Appeals in this case understood this fact and correctly reversed.

CONCLUSION

For the reasons stated herein, Amici respectfully request that this Court deny leave in this case.

September 28, 2016

Respectfully submitted,

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Exhibit A

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Director

MEMORANDUM

DATE: September 9, 2016

TO: Judges
Court Administrators
Probate Registers
County Clerks

FROM: Robin Eagleson, Management Analyst
Jim Inloes, Management Analyst

RE: Final Rule Implementing the ADA Amendments Act of 2008

On July 15, 2016, the United States Attorney General signed a Final Rule incorporating the requirements of the ADA Amendments Act into the ADA Title II and Title III regulations. The Final Rule was published in the Federal Register on August 11, 2016, and takes effect on October 11, 2016. Although Michigan judges and ADA coordinators have been trained in a manner that is consistent with this Final Rule, the SCAO is providing you with the details of the rule.

Consistent with the ADA Amendments Act, the regulations establish the following:

- The definition of "disability" should be interpreted broadly. The question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.
- Major life activities now include the operation of major bodily functions, such as functions of the neurological, digestive, or respiratory systems. The ADA Amendments Act provides a more extensive, non-exhaustive list of examples of major life activities, which includes major bodily functions.
- Due to uncertainty about the meaning of "physical and mental impairments," the term is now illustrated with the additional examples of dyslexia and Attention Deficit/Hyperactivity Disorder (ADHD).

- Specific rules of construction apply when determining whether an individual has a disability. These rules of construction include the following:
    1. The primary issue in a case brought under the ADA should be whether the covered entity (i.e. the court) has complied with its obligations and whether discrimination has occurred, not the extent to which the individual's impairment substantially limits a major life activity;
    2. The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;
    3. In making the individualized assessment required by the ADA, the term "substantially limits" shall be interpreted to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act;
    4. The comparison to which an impairment substantially limits the ability of an individual to perform a major life activity should be to most people in the general population;
    5. Comparing an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;
    6. The ameliorative effects of mitigating measures, such as medication or hearing aids (but excepting ordinary eyeglasses and contact lenses), shall not be considered in assessing whether an individual has a disability;
    7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
    8. An impairment that substantially limits one major life activity need not substantially limit the other major life activities in order to be considered a substantially limiting impairment.
- It should be easier for individuals to establish coverage under the "regarded as" prong of the definition of "disability." The emphasis should be on how a person has been treated because of an actual or perceived physical or mental impairment (that is not transitory and minor), rather than on what a covered entity may have believed about the nature or severity of the person's impairment.
- Individuals covered under the "regarded as" prong are not entitled to reasonable modifications.

The Department has also published Questions and Answers on the Final Rule that provide additional information.

If you have any questions regarding the above information, please contact Robin Eagleson at 517-373-5542 or eaglesonr@courts.mi.gov or Jim Inloes at 517-373-0122 or inloesj@courts.mi.gov.